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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 802

WALTER J. TROTTER and GEORGE D. SLABAUGH for themselves and for and in behalf of EUGENE ZYNDA, et al.,
Petitioners,

vs.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1303; AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, Walter J. Trotter and George D. Slabaugh, for themselves and for and in behalf of other named plaintiffs, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on November 9, 1962.

OPINIONS BELOW

The judgment of the district court (17a-26a) denying plaintiffs' prayer for relief and dismissing their Complaint is unreported. The opinion of the Court of Appeals is reported in 309 F. 2d 584, and a copy is appended hereto (Appendix A, 1a).

JURISDICTION

The judgment of the Court of Appeals is dated November 9, 1962, and was entered on the same date. The jurisdiction of this court is invoked under 28 *U. S. C.*, Section 1254 (1).

QUESTIONS PRESENTED

1. Are the rulings of the District Court and the Court of Appeals consistent with the principles enunciated by this court in *Steele vs. L. and N. Rd. Co.*, 323 U. S. 192, 65 Sp. Ct. 226; and *Ford Motor Co. vs. Huffman*, 345 U. S. 330, 73 Sp. Ct. 681?

2. Whether the Court of Appeals correctly ruled that the sale of certain operating rights did not constitute a reduction in the forces of labor within the meaning of the provision of the union constitution relating thereto in view of (1) the finding of the District Court that the employer required fewer operators after the sale; (2) the express language of the union constitution and (3) the testimony of both the president of the local and an international representative that the sale necessarily [illegible]d, and did, result in a reduction in the forces of labor employed by Greyhound.

3. Where the International Constitution of a union requires that, when an employer takes any action resulting in a reduction in the number of its employees, the last hired must be the first laid off, does a union breach its duty of representation under Section 9(a) of the National Labor Relations Act if it refuses to obey this mandate of its Constitution in negotiating with the employer as to the seniority rights of the remaining employees following a reduction in force?

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

> "Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives

of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. • • •

• • •

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: • • •."

61 *Stat.* 140, 143, 29 *U. S. C.* (Supp. V) Secs. 157, 159 (a).

STATEMENT

Jurisdiction of the trial court was predicated on the existence of a Federal question arising under 29 *U. S. C. A.*, Sec. 157, et seq., 61 *Stat.* 140, et seq.; and 28 *U. S. C. A.*, Sec. 2201, as amended, being 68 *Stat.* 890 (3a).

This is a class action brought in behalf of certain suburban Detroit drivers employed, and formerly employed, by Central Greyhound Corporation, to require the plaintiffs' collective bargaining agent to discharge its duty of fair representation and for damages arising from its failure to do so. Specifically, it is claimed that the union (i.e. the Local Division and the International) failed to act to protect plaintiffs' seniority rights, or to negotiate a new agreement with the company to meet the changed conditions brought about by the sale of its suburban Detroit operating rights by Central Greyhound in January, 1958.

Prior to the early part of 1958, Central Greyhound had four garages in the Detroit area — one from which the highway (i.e. interstate and intrastate runs, as distinguished from Detroit suburban) drivers were dispatched; and garages at Mount Clemens, Birmingham and Wyandotte, which are suburbs of Detroit. Besides the foregoing, this seniority district included certain runs dispatched from Bay City, Muskegon and Grand Rapids, Michigan; Dayton, Columbus and Cincinnati, Ohio; Chicago, Illinois;

St. Louis, Missouri; and Indianapolis, Indiana (33a-34a).

The constitution of defendant union contains a section entitled "Priority Question" (Appendix B hereof, 5a). This section reflects the policy of the union on seniority problems. Two types of seniority are recognized: garage and system seniority. Where, however, garage seniority is in effect, system seniority must be followed for the purpose of determining which employees are to be laid off in the event of a transfer of lines, reorganization, consolidation, abandonment of lines, or a reduction in the forces of labor. In short, the entire thrust of the provision is to the effect that the brunt of any action adversely affecting the employment of the members of the Amalgamated Association must be borne by employees with the least seniority *on the system*. Consistent with the requirements of the union constitution, the contract included a provision permitting the changing of seniority provisions upon mutual agreement between the company and the Association, and a majority approval by the membership in a referendum.

The collective bargaining agreement in effect as of the time of the sale provided for garage seniority and each driver was entitled only to the work available at the garage at which he held his seniority. He could neither bump another man at one of the other garages (suburban or highway) nor transfer and take his job seniority with him, with the following exception or addition:

In connection with the negotiation of the 1953 agreement, the union demanded, and got, an agreement that highway drivers hired prior to that date would have a seniority date of May 1, 1953 on the suburban seniority rosters; and suburban drivers hired previously would have a seniority date of May 1, 1953 on the highway rosters and at each of the other suburban garages (96a-101a). This was originally added to the 1953 contract as a supplement and was continued in subsequent collective bargaining agreements, including the 1956 agreement which was in force as of the time of the sale of suburban rights in January, 1958. The demand for this provision arose out of the fact that in the winter the Detroit highway operation falls off and the Detroit suburban load increases; while the opposite tends to be true in the summer. It is clear

that this provision was adopted by the membership for the purpose of alleviating the above-described situation and not in contemplation of a sale of operating rights (38a-39a; 52a; 73a; 76a; 80a).

The suburban drivers frequently took out highway runs on charters, at holiday times, and in the summer and there is no dispute that their skill, competence, physical fitness, family responsibilities, age and length of service with Greyhound would average the same as for the highway drivers (28a; 44a; 47a; 57a-59a; 60a-66a).

Subsequent to receiving notice from Greyhound of the sale of the suburban operating rights, William Marshall, president and business agent of the Local Division, devoted himself to two objectives: (1) persuading Great Lakes Transit to enter into the same contract as the Local Division had with Central Greyhound, as to wages, hours, working conditions and pensions; and (2) obtaining an agreement from both Great Lakes Transit and Central Greyhound that the suburban drivers would have a period of 90 days (instead of the 30 proposed by the company) within which to decide whether to go with Great Lakes Transit with all their Greyhound seniority or stay with Central Greyhound with the May 1, 1953 date (37a-38a; 41a-42a). An agreement as to both of the objectives was achieved some time prior to February 28, 1958. No meetings were called and no opportunity given the membership to express their views prior to the making of this agreement (29a-30a; 40a-42a; 48a-49a; 86a).

The suburban drivers protested against being faced with this choice. On March 11, 1958, a formal grievance was presented to the Local Division in which the protestants demanded their rights under Secs. 163 and 83 of the union constitution (30a; 45a; 48a; 54a).

This grievance was read to the membership at a meeting held in March, 1958, by President Marshall — after which he wadded it up, threw it on the desk, told the men they had no grievance and refused to permit any discussion of it. An appeal was taken from this action to the International president, General Executive Board, and International Convention, all of whom denied plaintiffs' appeal (49a-52a; 81a).

Although both Marshall and Edward W. Oliver, a representative of the International Union, testified that the result of the sale of the operating rights was a reduction in force by Greyhound, and that the union had an obligation to its members, as defined in the Constitution of the International Union, they claimed nothing different could have been done because of the composition of this Local Division — that is, the highway men out-numbered the suburban by about three to one and would consistently refuse to approve any contract or permit any action which would give former suburban operators seniority rights at the expense of any of the highway men, as would have been the case had the union required Greyhound to revert to system seniority in making the layoffs following the reduction in force (42a-43a; 54a-56a; 81a; 88a; 89a; 90a).

The District Court noted in Section 11 of its Findings of Fact that:

> "Because of the sale, there was not enough work on the highway operations to absorb the full time employment of the former suburban operators who elected to stay with Greyhound" (22a).

Knowing he could not get the approval of a majority of the membership of Local Division 1303 to any program other than the one he followed, Marshall never requested that Greyhound enter into negotiations with reference to seniority rights following the sale (37a-38a; 81a), although the company had negotiated with the union to meet changed situations arising during the contract term on other occasions (83a-86a). This same consideration prevented him from submitting a proposal for system seniority for the suburban drivers displaced by the sale during the negotiations for the 1958 contract, to replace the expiring 1956-58 agreement, although he considered the grievance, then pending on appeal, a request for such a change (54a, 55a).

No evidence was taken as to the damages suffered by the plaintiffs, by reason of a stipulation between counsel that the question of liability should first be finally determined (43a).

The District Court made it clear, both in Sections 15 and 20 of its Findings of Fact and in the discussion in-

serted between the Findings of Fact and Conclusions of Law that its decision was based upon the premise that this is a democratic union, and it does not constitute hostile discrimination to insist that the minority bow to the will of the majority (23a-24a).

The Court of Appeals did not discuss this point but simply ruled that the sale of the suburban rights did not result in a reduction in the forces of labor within the meaning of the provision of the union constitution; and that the action of the union was within the wide range of reasonableness allowed a statutory bargaining representative, citing *Ford Motor Co. vs. Huffman*, 345 U. S. 330, 338.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Sixth Circuit erred:

On the first question —

1. In failing to hold that the breach by a collective bargaining representative of its duty to represent all its members fairly and impartially while making it, renders void a seniority agreement which remits a minority to inferior employment rights, where the relevant factors are the same for all members of the class and the only reason for the discrimination is that the majority willed it.

On the second question —

2. In holding that the provisions of the union constitution relating to priority of right to employment following a reduction in the forces of labor by the employer were not applicable.

On the third question —

3. In failing to hold that defendant union was bound to effectuate the policy, and be guided by the standard of representation, expressed in its own constitution.

4. In affirming the Order of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court.
2. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the lower court, as to call for an exercise of this court's power.
3. The decision of the Court of Appeals, if allowed to stand, will have a widespread and detrimental effect on industrial relations and further weaken the whole complex of collective bargaining.

ARGUMENT

1. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court.

The applicable decisions of this court are *Steele vs. L. and N. Rd. Co.*, 323 U. S. 192, 200-204, 65 Sp. Ct. 226; and *Ford Motor Co. vs. Huffman*, 345 U. S. 330, 338-339, 73 Sp. Ct. 681.

In *Steele*, this court held that

(a) The collective bargaining representative has a duty to represent all members of the class or craft — the minority and non-members, as well as the majority;

(b) It must exercise the power conferred on it fairly and without hostile discrimination against any part of the unit;

(c) It is not required that a contract give each employee the same rights in all respects, but any differences must be based on relevant factors or variations in interest or merit;

(d) Conversely, an agreement not based on relevant differences is void as being beyond the power of the bargaining representative to make;

(e) The union is required to consider the requests of non-union or minority members and to permit them

to express their views on proposals which will affect them.

In *Ford Motor Co. vs. Huffman*, supra, this court directed its attention specifically to those considerations which determine whether a seniority agreement is fair or invalid as having been made in breach of the union's duty of representation. We summarize the pertinent holdings as follows:

(a) A collective bargaining agent which attains its status by reason of the provisions of the Labor-Management Relations Act has the same duty to represent all members of the class or craft as does one which derives its authority from the Railway Labor Act;

(b) Seniority may be based on the length of competent service, in the first instance, but variations in seniority rights among members of the class or craft are acceptable so long as they are based on factors which are within the reasonable bounds of relevancy.

At the outset, we note there is no question raised as to whether the union had to take any action at the time of the sale of the suburban rights. It is clear that the bargaining representative considered that any change in operations called for it to negotiate with the company as to the impact of such change on seniority rights. Once it had undertaken to act, it could not refuse to take an objective approach to the problem.

Applying the rules enunciated in *Steele vs. L. and N. Rd. Co.*, supra, and *Ford Motor Co. vs. Huffman*, supra, and ignoring for the moment the provisions of the union constitution, we point out, first, that the union makes no claim to the existence of any factors which provide a basis for refusing to demand that Greyhound integrate the seniority list of those employees who had generally operated suburban buses with that of the so-called highway drivers when there was a decrease in the number of jobs available. Inasmuch as all drivers had, at different times, worked on the suburban, intrastate and interstate runs, there is

no question of differences in competence and skill. Both groups had, on the average, the same physical fitness, age range, family responsibilities, and so on. The defendants state plainly that the sole reason for its refusal to apply length of service as a final criterion — all other factors being equal — was that the highway drivers who constituted the majority within the Local Division decided they did not wish to permit the former suburban operators to assert their full system seniority with Greyhound. We submit this does not constitute an exercise of discretion by the union, based on relevant differences, but is sheer caprice.

In connection with the above discussion, we do not overlook the fact that the District Court adverted to "unit" as a basis for a variation in seniority rights (25a), possibly with the thought that the highway operation constituted one unit and the suburban another. It would appear, however, for this to create a relevant difference that there be some variation in the type of work performed in different units. That is, there would be some relevance if the issue involved the integration of a production unit seniority list with a skilled trades group seniority list; but light assembly work in one part of a plant would seem to qualify one for light assembly work in another department of a plant, unless it was made to appear that there was such a difference in the work to be performed at the different locations as to require a different kind of skill.

A proposition is advanced by the defendants that the suburban drivers suffered no diminution of seniority rights because they were permitted to remain with Greyhound, if they chose, and have the same rights on the highway operation as they had before the sale. This claim overlooks several factors:

1. That before the sale, plaintiffs were exercising their system seniority with Greyhound at their respective garages in addition to the concurrent seniority at the highway garage;

2. The concurrent seniority which the suburban drivers had at the highway garage, and the highway drivers had at the suburban garages, was not negotiated in contemplation of a sale but was for the purpose of

assuring the highway drivers of steadier employment in the winter;

3. This being so, the sale of the suburban rights created a new situation, not in contemplation of the parties at the time the 1956 collective bargaining agreement was entered into, as to which the union had a duty to negotiate. *Conley vs. Gibson*, 355 U. S. 41, 46; 78 Sp. Ct. 99;

4. In bargaining with reference to the changed situation, the union was under the same duty of fair representation as in making the original agreement and could no more validly agree then to a restricted seniority for a minority of the class, not based on any relevant differences, than it could have in making the original agreement.

For the sake of clarity, we state specifically that the agreement under attack was the one made by Marshall, president and business agent of the Local Division, some time around February, 1958. This agreement was highly informal, being neither written nor submitted to the membership, but it is clear from the proofs that it was to the effect that any former suburban drivers who elected to stay with Greyhound could exercise seniority with Greyhound only from May 1, 1953 — the date from which their concurrent seniority on the highway runs was established. This informal agreement fixed the seniority rights of former suburban drivers in subsequent collective bargaining agreements for all practical purposes.

2. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the lower court, as to call for an exercise of this court's power.

The second ground assigned by the Court of Appeals for upholding the dismissal of the Complaint was its opinion that the sale of the suburban rights did not constitute a reduction in the forces of labor within the meaning of the Priority Question provision of the union constitution. No

reason is given for this conclusion, which is wholly without foundation in the record.

Under the union constitution (Ex. B), motormen, conductors, one-man car and bus operators are one class; and barn, shop, garage, and track employees comprise other classes not here involved. Either garage or system seniority is permitted but this permission is modified by the requirement that system seniority must always be used to determine which employees shall suffer loss of work in the event of replacement of two-men cars or buses by one-man vehicles; transfers of lines from one garage to another; and reorganization, consolidation, or abandonment of lines. The constitution further provides that

> "Sec. 163. In case of a reduction in the forces of labor on any * * * bus system affecting the employes who are members of this Association, the rules of reduction shall be as follows:
>
> * * *
>
> "* * * should there be a general suspension affecting the entire system on which there is more than one * * * garage, the last employes in the classes affected shall be the ones to be suspended * * *."

Whether one applies the rules of construction of constitutions or of contracts, the law is the same: where the language is plain, the words are to be given their ordinary and usual meaning. 11 *Am. Jur.* p. 678, Constitutional Law; 12 *Am. Jur.* p. 750, Contracts. The language is not ambiguous and the term "reduction in the forces of labor" is not modified as to cause, duration, number of employees affected, or place of occurrence. It is wholly consistent with all other provisions of the constitution relating to priority of right to employment. There is nothing inherently unfair or against public policy on the face of it and if there are any circumstances which make it so in the situation here involved, the defendants have failed to point out what they are.

If a bus system owns operating rights requiring x number of employees to man them, and sells certain of these rights on which 200 persons are employed and no longer

has jobs for the 200, it would seem to follow that the system has suffered a reduction in force. The trial court found that 61 of the approximately 190 suburban operators elected to stay with Greyhound at the expense of forfeiting years of seniority acquired by them prior to May 1, 1953; and, because of the sale, Greyhound did not have enough work even for this number. William Marshall, president of the Local at the time of the sale, and Edward Oliver, an International representative, both of whom were witnesses called by the defendants, testified that the sale of these operating rights would, and did, result in a reduction in force by Greyhound.

While the finding of fact by the District Court did not repeat the language of the union constitution, the only possible significance of the above statement and the subsequent findings of fact, discussion and conclusions of law is that there was a reduction in force which gave rise to the right to the application of system seniority for the purpose of determining which employees must suffer the brunt of the reduction in force, but this was not done because the majority refused to sanction such procedure and, being a democratic union, plaintiffs must accept the majority decision. As an appellate body, the Court of Appeals was limited to determining whether there was substantial evidence to support the findings of fact of the District Court and to deciding whether the District Court reached correct conclusions of law under applicable decisions, particularly those of this court. It did neither. Instead, the Court of Appeals redetermined the issues of fact; and disposed of the issues of law with the statement that a labor union is allowed a wide range of reasonableness in serving its members. We do not quarrel with this observation as a general statement of the law, but it only begs the question of whether the union's conduct was within that wide range, in this instance, when tested by accepted standards.

The accepted and usual course of judicial proceedings is summed up in the phrase "due process of law." Due process involves not only notice and an opportunity to be heard, but a decision based on the evidence. *St. Joseph's Stockyards Co. vs. The United States, et al.*, 298 U. S.

33, 51; 56 Sp. Ct. 720; 80 L. Ed. 1033, and *Shields vs. Utah Idaho R. Co.*, 305 U. S. 177, 185; 83 L. Ed. 111; 59 Sp. Ct. 160.

Entirely aside from the holding by the District Court, we respectfully submit that, under applicable rules of law, the opinion of the Court of Appeals that the provision of the union constitution governing the conduct of the Local in the event of a reduction in force has no application here, is so arbitrary as to constitute a denial of due process of law.

If, as plaintiffs contend, the provisions of the union constitution are applicable, it follows that the union is bound to discharge its duty as prescribed thereby. This is true whether one accepts the viewpoint that the constitution of a union is a binding contract between it and its members, whether one considers that it expresses the result of the exercise of discretion by the union or takes the position that it removes all discretion from the Locals. However one characterizes it, the constitution speaks; and it states the decision of the membership — based on many years of experience as to the effect on the members of the numerous technological changes in this industry — that the fairest solution is to establish length of service with the employer as the controlling element in negotiations affecting seniority rights.

Plaintiffs do not claim that the decision of a union — even one expressed in its constitution — must necessarily be accepted by the courts and it is not inconceivable that in some cases such a rule would have to yield to other circumstances or factors. What plaintiffs do say is that the refusal of the Local to obey the mandate of its constitution raises a presumption that it is acting unfairly and discriminatorily and the burden is on the Local to justify its action. It is no more an excuse to say that the majority of the Local does not wish to obey its constitution than it is to say that a majority of a community is opposed to granting any other minority equal protection of the laws. Inherent in the power of a majority is the duty to protect the rights of the minority and when the body politic refuses to do so, the courts intervene.

The Court of Appeals also suggests that plaintiffs' true objective was to gain greater seniority rights than they

had prior to the sale. Plaintiffs do not agree. Under the contract they had garage seniority plus concurrent seniority on highway runs; and, under the constitution, they had the right to the full use of the collective force of the union to enforce system seniority for the purpose of determining who would be laid off in the event of a reduction in force. This constitutional provision was a modification of both their own garage seniority and that of the highway drivers. They sought only to enforce the promise made when they joined the union.

In sum, the union constitution prescribes the union policy as to the preferable seniority rule. It makes explicit that system seniority is the pattern which the union, as collective bargaining representative, undertakes to compel the employer to accept on the happening of certain specified events. The union made no effort whatsoever to achieve this and has thereby failed to fulfill its statutory duty of fair representation.

3. The decision of the Court of Appeals, if allowed to stand, will have a widespread and detrimental effect on industrial relations and further weaken the whole complex of collective bargaining.

The chief source of industrial unrest, historically, lay in the arbitrary power of the employer to hire and fire at will. It has been observed by many courts, many times, that the purpose of the Wagner Act, and its subsequent amendments, was to encourage industrial peace by stabilizing labor-management relations through the device of collective action.

Such stability can be achieved only by creating rights which are enforceable by the individual. Merely to exchange an arbitrary employer for an arbitrary union not only fails to benefit the individual but may actually encourage industrial warfare. Seniority rights in particular are gained not only at the expense of submerging the right of the individual to bargain as to the terms of his employment in the collective interest, but the employee also exchanges whatever he might have acquired by his individual merit in return for greater security. If he does not, in fact, achieve this security through collective agree-

ments negotiated on the basis of objective factors, then he is twice defrauded. There can, for example, be little doubt that the Greyhound corporation would have found some of the suburban operators more desirable as employees than some of the highway operators and, in the absence of any collective bargaining situation, would have retained these men in their employment following the sale of the suburban rights.

This court suggested in the *Steele* case that if the majority did not protect the rights of the minority, the minority would be forced to strike to enforce its rights. We respectfully suggest that the minority does not even have this weapon if the majority ignores its picket lines and, of course, there is no reason to believe the majority would honor them.

It seems to us that the real threat to collective bargaining as a means to insuring industrial peace now appears in quite a different manner. The unions achieved their maximum membership in 1954 and suffered a net loss of membership of approximately a half million during the 1957-1958 recession. This loss has not been regained.[1] During the year 1958 unions won 63% of the elections conducted by the National Labor Relations Board. Since 1958 this figure has dropped and during the last four years unions have won between 56% and 58% of the elections conducted by the National Labor Relations Board.[2] We suggest that the 1957-1958 recession afforded the first test of the effectiveness of union security and that the disillusionment with unions resulting therefrom accounts quite as much for the fact that the ratio of membership in unions is not keeping pace with the growth in the work force, as relocation of plants, automation or any other factor. References to the loss by the unions of their crusading zeal and social conscience of earlier years are appearing with increasing frequency in both popular news media and profes-

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[1]Bulletin No. 1320, March, 1962, United States Department of Labor, Bureau of Labor Statistics.

[2]Summary of Operations, Office of the General Counsel, National Labor Relations Board, calendar year 1962.

sional literature. The only available substitute for social conscience is legal responsibility and the lower courts are particularly in need of guidance as to the rights and remedies of the individual members against their unions as their collective bargaining representatives.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this court.

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals
Decided November 9, 1962.

Before: MILLER, Circuit Judge, BOYD and MCNAMEE, District Judges.

MILLER, Circuit Judge. Central Greyhound Lines, hereinafter referred to as Greyhound, owned and operated three suburban bus lines or divisions in the Detroit, Michigan, area, and also an interstate highway division out of Detroit. Each of these four divisions constituted a separate seniority district. Prior to May 1, 1953, its bus drivers had seniority only in the district where they worked, with no right of interchange of seniority between the suburban districts or between a suburban district and the highway district. If a driver wanted to work in another district, suburban or highway, he started in as a new man at the bottom of the seniority roster in that district.

The defendant union, as bargaining agent for the Greyhound employees, included in the collective bargaining agreement of May 1, 1953, an interchange of seniority provision, which provided that highway drivers hired prior to that date, transferring to a suburban division, would have a seniority date as of May 1, 1953, on the suburban seniority roster, and suburban drivers hired prior to that date would have a seniority date of May 1, 1953, on the highway roster and on each of the other suburban seniority rosters. This seniority provision was continued in each subsequent collective bargaining agreement between the union and Greyhound and was in effect on March 1, 1958.

On March 1, 1958, Greyhound sold its suburban lines to Great Lakes Transit Company, hereinafter referred to as Great Lakes. While negotiations for the sale were pending the union officers became concerned about the job rights of its members and the possibility that Great Lakes would not hire the Greyhound suburban drivers, and entered into negotiations for the purpose of safeguarding the rights of these employees. As a result of its efforts, Great Lakes agreed to hire all or any of the suburban drivers who elected to become its employees and assumed the contractual obligations of the employer under the col-

lective bargaining agreement then in force. Greyhound and Great Lakes granted the drivers a period of 90 days in which to decide, each for himself, whether he wanted to continue on the suburban work, as an employee of Great Lakes with his existing seniority rights or whether to transfer to the highway district of Greyhound with seniority rights in that district as provided by the collective bargaining agreement of May 1, 1953.

Of approximately 190 suburban drivers at the time of sale, approximately 61 of them elected to transfer to the Greyhound highway district. They obtained seniority in the highway operation as of May 1, 1953, in accordance with the May 1, 1953, bargaining agreement. The remaining suburban drivers elected to remain on the suburban districts as employees of Great Lakes. They have had steady employment since then with the seniority which they had as employees of Greyhound.

This action was filed as a class action by two of the suburban drivers who transferred to the Greyhound highway district. The complaint alleges that as a result of the sale, the number of bus drivers employed and to be employed by Greyhound had been reduced and that it was incumbent upon the union to negotiate an agreement with Greyhound which would fairly apportion the remaining jobs among all the employees of Greyhound, but that the union, notwithstanding its duties to fairly and indiscriminately represent all the Greyhound employees, had failed to do so and had arbitrarily agreed with Greyhound that the plaintiffs shall not be permitted to exercise seniority rights on the remaining jobs based on a seniority date earlier than May 1, 1953. The complaint alleges that this agreement did not reflect relevant factors such as total seniority, safety records, employment history and other pertinent matters, and thus unjustly discriminated against the plaintiffs with reference to seniority and other job rights in favor of the highway drivers. The complaint asks that the union be enjoined from causing Greyhound to discriminate against them in their employment, and that Greyhound be enjoined from giving any force and effect whatsoever to any agreement limiting the seniority of plaintiffs, or any of them, to May 1, 1953, in assignment

of work, leaves of absence or any other incidents of their employment based on seniority.

The District Judge held that the seniority rights of the plaintiffs were derived from and controlled by the provisions of the collective bargaining agreement of May 1, 1953, *Aeronautical Lodge vs. Campbell*, 337 U. S. 521, 526, and that there was no competent proof of a breach of the duty of fair representation of the membership of the union in connection with the sale of March 1, 1958. He entered judgment dismissing the complaint.

Appellants rely strongly upon *Steele vs. L. & N. R. Co.*, 323 U. S. 192, *Tunstall vs. Brotherhood*, 323 U. S. 210, *Mount vs. Grand International Brotherhood of Loc. Eng.*, 226 F. (2) 604, C. A. 6th, cert. denied, 350 U. S. 967, and *Hargrove vs. Brotherhood of Locomotive Engineers*, 116 F. Supp. 3, D. C. These cases are examples of the now well settled rule that the bargaining representative of employees has the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against any employee or group of employees. Whether the bargaining representative has acted fairly and impartially and without hostile discrimination depends upon the facts of each case. As was said in *Ford Motor Co. vs. Huffman*, 345 U. S. 330, 338:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

In the present case the suburban drivers acquired certain seniority rights in the highway district by the collective bargaining agreement of May 1, 1953, which they did not have before. The sale of the suburban operations in 1958 did not destroy those rights. The suburban drivers who elected to transfer to the highway district did so with

seniority rights as provided by the bargaining agreement of May 1, 1953. They were not required to transfer and those who did not elect to transfer retained their existing seniority rights as suburban drivers and have had steady employment with Great Lakes since then. Appellants' real complaint appears to be, not that any existing seniority rights were taken from them or that other suburban drivers acquired rights which were not available to them, but that in connection with the sale they did not acquire better seniority rights than they already had under the May 1, 1953, bargaining agreement. We do not think that this constituted discrimination against them within the meaning of *Steele vs. L. & N. R. Co.*, supra, and *Ford Motor Co. vs. Huffman*, supra.

Appellants also contend that under the provisions of Section 163 of the Constitution of the union they are entitled to greater seniority rights than they now have under the bargaining agreement of May 1, 1953. This section reads in part as follows:

> "In case of a reduction in the forces of labor on any street railway or bus system affecting the employes who are members of this Association, the rules of reduction shall be as follows: * * *."

The claim is made that the sale of the suburban lines constituted "a reduction in the forces of labor" and that their rights are those provided by the provisions of that section instead of by the bargaining agreement of May 1, 1953. We are of the opinion that the sale of the suburban lines did not constitute "a reduction in the forces of labor" within the meaning of that section.

The judgment is affirmed.

APPENDIX B

Priority Question provisions of the union constitution

PRIORITY QUESTION

Sec. 160. Each member of this Association shall be entitled to his or her seniority in the service in the class of employment in which he or she is engaged, in accordance with his or her continuous age in the service in their respective classes. In train service but two classes of seniority shall be recognized, namely, barn, station or garage seniority; or system seniority.

Members in train and bus or coach service, such as motormen, conductors, one-man car operators, bus and coach operators and conductors and other classes of train men and coach and bus service men, shall hold their continuous age in the employment in their class of work at the barn or station or garage or on the system with which they operate; motormen in the class of motormen; conductors in the class of conductors, and so on through the various classes of train work.

Where one-man cars or buses are put on to take the place of two-man cars, the motormen and conductors shall be entitled to such one-man car or bus work according to their present seniority standing in their respective classes as motormen or conductors.

Where lines are transferred from one barn, or station or garage to another barn or station or garage, the rule of transfer shall be as follows: Notice to the members at the barn or station or garage from which the change is being made shall be given, informing them of the change. Then all men on all lines at that barn or station or garage shall make a new selection of runs according to their seniority rights, then the men who have selected on the line that is to be changed or transferred shall follow their work to the barn or station or garage to which the work goes, carrying with them their full seniority to that barn or station or garage. After being transferred they shall hold their seniority at the barn or station or garage transferred to, according to their continuous age in the service, in their respective classes.

Where any lines are reorganized or consolidated or changed, cutting off car runs and substituting bus service, then all men affected by the change shall choose their work in bus service according to their seniority in the service of the company until all work is filled. If there is any loss of work it shall fall to the lot of the last man hired in the service; if an extension of work, it shall fall to the men in the car service according to their seniority in the service of the company. When extra men are needed for bus service, the men in car service shall have first choice according to their seniority rights.

When there is an abandonment of lines or barns, members affected by the abandonment shall be allowed to select work according to system seniority at other barns or stations.

Sec. 161. Where system seniority is established, one line of seniority shall prevail, viz: All motormen, conductors, one-man car and bus operators shall choose their runs according to their continuous age in the service, choosing any run they are qualified to operate, either as motormen, conductor, one-man car or bus operator. Where system seniority is in effect or systems having two or more stations or barns, the system selection shall take place every two years unless these conditions are changed by agreement and during the interim trainmen and bus operators shall hold their seniority in the station or barn they have selected and shall have the right to change runs as schedule conditions change at that station or barn.

Sec. 162. In barn, shop, garage, track and other branches of street railway service, outside of train service, the members shall be entitled to seniority in their respective classes of work and shall have the right to advance from one class of work to another class of work, providing they can qualify.

Sec. 163. In case of a reduction in the forces of labor on any street railway or bus system affecting the employes who are members of this Association, the rules of reduction shall be as follows:

First, where there is a suspension of work affecting motormen, conductors, one-man car and bus operators at any barn, station or garage, the youngest employes in sen-

iority of service at that station shall be suspended. This is to apply to systems where barn seniority is in effect only, and shall not be interpreted to apply where system seniority regarding lay-offs is in effect.

Second, should there be a general suspension affecting the entire system on which there is more than one barn, station or garage, the last employes in the classes affected shall be the ones to be suspended, and after such suspension, if it is necessary to readjust the operating forces over the entire system, the remaining employes, in their respective classes, shall be given their seniority on the system and, if necessary, to establish that seniority they shall be transferred to barns, stations or garages where their seniority rights are established, such transfers or changes to be in accordance with their system seniority.

Third, in barn, station, garage and shop service, the last employes hired on the system in the service shall be the first to be laid off, and so on down the line, and the employes in these Departments shall fall back in their classes of employment in the same order that they had advanced according to their seniority in the continuous age in the service of the operating company.

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No. 803

IN THE

Supreme Court of the United States

October Term, 1962

WALTER J. TROTTER AND GEORGE D. SLABAUGH, for themselves and for and in behalf of EUGENE ZYNDA, et al., *Petitioners*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 1303; AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

Joint Brief for the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO, and Division 1303, in Opposition.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 802

WALTER J. TROTTER AND GEORGE D. SLABAUGH, for themselves and for and in behalf of EUGENE ZYNDA, et al., *Petitioners*

v.

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Joint Brief for the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO, and Division 1303, in Opposition.

OPINIONS BELOW

The district court's findings of fact and conclusions of law (17a-25a) and judgment dismissing the complaint (26a) are unreported. The opinion of the court of appeals (Pet. 1a-3a) is reported at 309 F.2d 584.

JURISDICTION

The opinion and judgment of the court of appeals were entered on November 9, 1962. The petition for a writ of

certiorari was filed on February 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the labor organizations serving as petitioners' collective bargaining agents fairly and impartially represented all the employes in the bargaining unit, and acted without hostile discrimination, in the steps taken to protect employes' job rights upon the sale of the employer's suburban operations.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 2-3 of the petition.

STATEMENT

On March 1, 1958, Central Greyhound Lines, hereinafter called Greyhound, sold its suburban operations in the Detroit, Michigan, area to Great Lakes Transit Co., hereinafter called Great Lakes (21a, Pet. 1a; 94b).[1] Prior to that date, the three suburban divisions sold, and an interstate highway division out of Detroit which Greyhound continues to own and operate, had constituted four separate seniority districts (20a-21a, Pet. 1a; 40b, 102b-103b). Also operative within each seniority district was a reciprocal system for seniority interchange between districts (20a, Pet. 1a; 103b, 96a-99a). This modification on strict district seniority was negotiated originally in 1953 and retained in subsequent Greyhound contracts by the respondent labor organizations serving as petitioners' bargaining agents (20a, Pet. 1a; 12b, 45b, 2b, 16b-17b). The concurrent seniority clause provided that (103b):

---

[1] References preceding a semicolon are to the findings below; those following are to the supporting evidence.

> "Highway operators shall commence to acquire seniority on all suburban divisions * * * as of May 1, 1953. Suburban operators shall commence to acquire seniority on all highway operations and on all other suburban districts * * * as of May 1, 1953."

Under this clause, all operators accrued seniority in each seniority district from May 1, 1953 on an equal basis. No driver hired prior to this date suffered any dilution of seniority already earned within his own district. On the other hand, preservation of existing rights without dilution necessarily prevented any driver hired prior to adoption of the reciprocal system from transferring to another seniority district with full date-of-hire job seniority. No claim of unfair representation or hostile discrimination on the part of the bargaining agents is, or was ever, made with respect to this system as applied prior to March 1, 1958 (79b).

When, in January 1958, the union received notice of the prospective sale of Greyhound's Detroit suburban operations, the union officers sought to safeguard the job rights of the suburban drivers, who were fearful that Great Lakes would not hire them (21a, Pet. 1a; 6b, 70b, 76b, 98b-101b). As a result of the efforts of union officers, including the committeemen of the various suburban districts, Great Lakes agreed to hire all or any of the suburban drivers who elected to become its employes and assumed all of the obligations of the collective bargaining agreement then in force (21a, Pet. 1a-2a; 8b, 40b-41b, 42b-43b, 71b, 85b). Greyhound and Great Lakes also, at the union's urging, granted the suburban drivers a period of ninety days in which to decide, each for himself, whether he wanted to continue on the suburban work, as an employe of Great Lakes, or transfer to the highway district of Greyhound through the exercise of his concurrent seniority rights accrued from the May 1, 1953 cutoff date (21a, Pet. 2a; 84b-85b). However, no new contract negotiations were entered into at the time

of the sale regarding any driver's seniority rights; the discussions related to the orderly exercise of job rights under the existing contract, and to the physical transfer of the men and equipment (21a, Pet. 1a-2a; 94b-96b, 77b).

All but about 61 of the approximately 190 suburban drivers elected to become employes of Great Lakes under these arrangements (21a, Pet. 2a; 8b). These drivers retained their date-of-hire seniority on the suburban work and have had steady employment under Great Lakes' operation (21a, 24a, Pet. 2a; 23b, 35b, 8b, 27b, 30b).

There was not enough work on the highway operations to absorb the full-time employment of the former suburban operators who elected to exercise their May 1, 1953 seniority rights under the collective bargaining agreement and stay with Greyhound (22a). Accordingly, these operators prosecuted a grievance within the union alleging they were entitled to transfer to the highway division with their suburban date-of-hire seniority. This grievance was processed in the manner prescribed by the union constitution and was denied at every step in the appeals procedure (22a; 81b-82b, 86b-87b, 89b-90b, 93b).

Petitioners' complaint in the instant action also alleges in substance that the sale of the suburban operations in 1958 required the reapportionment of the remaining jobs among Greyhound employes on a date-of-hire basis (Pet. 2a; 3a-7a).

The district court heard the case on the merits and entered judgment for the union. It held that petitioners' seniority rights derived exclusively from the collective bargaining contract between Greyhound and the union, and that there was no evidence of any breach of the duty of fair representation in relation to the seniority and job rights of the former suburban operators (17a-25a).

The court of appeals affirmed, concluding (Pet. 3a-4a):

> "Whether the bargaining representative has acted fairly and impartially and without hostile discrimination depends upon the facts of each case. * * *"
>
> In the present case * * * *[petitioners'] real complaint appears to be, not that any existing seniority rights were taken from them or that other suburban drivers acquired rights which were not available to them, but that in connection with the sale they did not acquire better seniority rights than they already have * * *. We do not think that this constituted discrimination against them within the meaning of *Steele* v. *L.&N.R. Co.* [323 U.S. 192] *supra*, and *Ford Motor Co.* v. *Huffman*, [345 U.S. 330], *supra*.

The court of appeals further held that the sale of the suburban lines did not give rise to "a reduction in the forces of labor" within the meaning of Section 163 of the union's constitution setting forth principles applicable in the event of "suspension[s] of work" (Pet. 4a; 94a-95a).

ARGUMENT

Petitioners concede that, under the applicable decisions of this court, "a labor union is allowed a wide range of reasonableness in serving its members" and further, that the courts below applied "accepted standards" in finding the union's conduct "within that wide range" (Pet. 13). The petition, therefore, presents only a factual issue which does not warrant review by this court. *General Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491. In any event, the decisions below are clearly correct.

An essential element of any claim of unfair representation with respect to seniority rights is a showing that the action or inaction of the statutory representative complained of is motivated by bad faith or by a hostile intent to discriminate against a portion of the union's membership.

Ford Motor Co. v. *Huffman*, 345 U.S. 330, 337-339; *Steele* v. *L&N.R.C. Co.*, 323 U.S. 192, 202-203. See also, *Gainey* v. *Brotherhood of Railway Clerks*, —— F.2d ——(C.A.2), 52 LRRM 2196, decided January 14, 1963; *Hardcastle* v. *Western Greyhound Lines*, 303 F.2d 182, 184-186 (C.A.9); *Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F.2d 604, 607 (C.A.6), cert. den., 350 U.S. 967; *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847, 851 (C.A.2). Because this essential element is lacking here, petitioners' contention that the sale of the suburban rights created a duty, breached by the bargaining agents, to demand that Greyhound agree to establish date-of-hire seniority for all drivers, must fail.

It is sheer nonsense to suggest that, in addition to the extensive efforts undertaken to protect the existing job rights of the suburban drivers and to secure their employment by Great Lakes, the union was also required to reopen the contract with Greyhound to negotiate new seniority rights for suburban drivers. At the very least, failure to do so can scarcely be taken as a sign of bad faith or hostile motivation.

Petitioners' own testimony fails to support the claim that the former suburban drivers were discriminated against with respect to their seniority rights (52a-53a). And there was no other evidence of bad faith or hostile intent (39b, 42b, 50b, 54b-55b). Moreover, the facts summarized in the Statement amply demonstrate that petitioners' rights have not been sacrificed, far less arbitrarily sacrificed in favor of the highway drivers. Petitioners had the same seniority rights after the sale as they had before. They could continue on the suburban work as employes of Great Lakes with their date-of-hire seniority, or they could go to Greyhound highway work with the May 1, 1953 seniority provided in the collective bargaining agreement (21a, Pet. 2a; 2b-3b, 8b, 22b-23b, 26b, 30b).

Furthermore, the reciprocal seniority system which ad-

mittedly produced no unfairness or disparity of treatment prior to the sale created no differences in suburban drivers' rights compared to highway drivers'. The only distinction made was between drivers hired before and after the date the concurrent seniority system was instituted. Hence, petitioners' argument that the reciprocal seniority provision does not reflect relevant differences in interest or merit, and is thus contrary to the requirements of *Steele* and *Huffman*, lacks any factual foundation. If, as petitioners concede, there was a valid reason for selecting May 1, 1953 as a date for beginning concurrent district seniority, it would appear no less rational thereafter to maintain that date.

Nor does the union's constitution provide any basis for petitioners' claim that they are entitled to greater seniority rights because of the sale of the suburban districts. Seniority rights are, of course, created and controlled solely by the agreement negotiated between the employer and the union acting as the collective bargaining agent for the employes. *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526; *Ford Motor Co.* v. *Huffman, supra; Ingersoll* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 257, 261 (C.A.6). In the absence of the May 1, 1953 concurrent seniority provision, petitioners would have had no seniority rights whatever in the Greyhound highway district.

In addition, petitioners read something into the union's constitution which patently is not there, in supposing that when an employer takes any action resulting in a reduction in the number of employes, the last hired must be the first laid off. The most that can be said of the constitutional provisions relied upon is that they recognize either *system* seniority or *division* seniority, whichever is created by the contract with the employer (94a-95a). Moreover, Section 163 referring to suspensions of work and reductions in force has never been interpreted as applying to the changed work situation created by the sale of transporta-

tion properties (72b, 8b). Hence, the court of appeals correctly found the union constitutional provisions inapplicable here.[2]

In sum, neither the union's constitution nor the provisions of the National Labor Relations Act, as amended, compels a collective bargaining representative to limit seniority classes solely to the relative lengths of employment of the respective employes. *Ford Motor Co.* v. *Huffman, supra,* 345 U.S. at 338-339; *Aeronautical Lodge* v. *Campbell, supra,* 337 U.S. at 528-529; *N.L.R.B.* v. *Wheland Co.,* 271 F.2d 122, 124-125 (C.A.6).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[2] There is no inconsistency between the facts found by the district court and the ruling of the court of appeals in this respect. Petitioners' contention that the appeals court redetermined issues of fact, thereby exceeding its reviewing jurisdiction, is groundless.

CERTIFICATE OF SERVICE

I hereby certify that on March ....., 1963 a copy of the foregoing Brief was served upon counsel for petitioner by depositing the same in the United States mail, air mail postage prepaid.

EARLE W. PUTNAM